

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 25.09.2019
CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.1479 of 2007
and
MP No.1 of 2007

Vijayalakshmi ... Appellant/ Appellant/Plaintiff
Vs

1. The Chairman,
Tamil Nadu Electricity Board,
Anna Salai, Chennai - 600 002.
2. The Superintending Engineer,
Chennai Electricity Distribution Circle,
Chennai North.
3. The Assistant Executive Engineer,
Tamil Nadu Electricity Board,
Madhavaram, Chennai.

... Respondents/ Respondents/ Defendants

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 17.05.2007 made in A.S. No.202 of 2005 on the file of the Additional District Judge, Fast Track Court II, Madras confirming the Judgment and Decree dated 18.01.2005 made in O.S. No.3955 of 2000 on the file of XV Assistant Judge, City Civil Court, Madras.

For Appellant : Mr.B.R. Shankaralingam
For Respondents : Mr.V. Viswanathan

JUDGMENT

The Second Appeal has been filed challenged the concurrent findings of the courts below.

Brief facts leading to the filing of the instant Second Appeal :

2. The plaintiff is the appellant in this Second Appeal. She filed a suit against the respondents to declare the show cause notice dated 06.7.1999 issued by the 3rd respondent and the orders passed by the 2nd respondent herein vide letter bearing No.329/2000, dated 10.5.2000, as null and void. She has also sought for a consequential permanent injunction restraining the respondents from disconnecting the appellant's electricity

connection bearing No.73-03-85 - Tariff III - B / Madhavaram in pursuance of the order of the second respondent bearing No. 329 /2000, dated 10.05.2000.

3. The suit O.S. No.3955 of 2000 filed by the appellant was dismissed by the 15th Assistant Judge, City Civil Court, Chennai by judgment and decree dated 18.01.2005.

4. Aggrieved by the dismissal, the appellant preferred the first appeal before the Additional District Judge, Fast Track Court- II, Chennai in A.S. No.202 of 2005. The appeal was heard in the absence of the appellant or her counsel and was dismissed by the lower appellate Court on merits by judgment and decree dated 17.05.2007.

5. Challenging the said Judgment and decree passed by the courts below, the Appellant /plaintiff has filed this Second Appeal.

6. Heard Mr.B.R. Shankaralingam, learned counsel for the Appellant and Mr.V. Viswanathan, learned counsel for the respondents.

7. The appellant has raised the following substantial questions of law in this second appeal

a. Whether not the Decree and Judgment rendered of the Courts below are against Law, perverse and non-consideration of evidence.

b. Whether the burden of proving the alleged tampering of the Electric Meter is on the Appellant or the Respondents.

c. Whether the Appellant was given opportunity and the enquiry proceedings was conducted in a fair manner by the Respondents.

8. Before addressing this Court with regard to the Substantial questions of law raised by the appellant in this Second Appeal, the learned counsel for the Appellant submitted that the lower Court under Order XLI Rule 17 CPC ought not to have dismissed the appeal on merits, in the absence of the appellant or her counsel at the time of hearing.

9. This Court also perused Order XLI Rule 17 CPC, which reads as follows :

"Where on the day fixed, or on any other day which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

¹[Explanation—Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]

10. The learned counsel for the appellant also drew the attention of this Court to a judgment of the Hon'ble Supreme Court in the case of Ghanshyam Dass Gupta versus Makhan Lal reported in (2012) 8 SCC 745 and in particular, he referred to paragraph 8 of the said judgment. The Hon'ble Supreme Court has considered Order XLI Rule 17(1) CPC read with the Explanation contained therein and has held that the appeal cannot be dismissed on merits as per the Explanation to Order XLI Rule 17 (1) CPC. The Hon'ble Supreme Court in an identical situation has remanded the matter back to the Lower Appellate Court for fresh consideration and the Lower Appellate Court was directed to dispose of the matter in accordance with law.

11. Section 100 (4) of CPC enables the High Court to formulate a Substantial question of law, if it is satisfied that a substantial question of law is involved in any case. Even though the appellant has not raised the substantial question of law at the time of filing of the Second Appeal as to whether the Lower Appellate Court can decide an appeal on merits without hearing the appellant or her counsel as per the provisions of the order XLI Rule 17(1) CPC, a necessity has come for this Court to formulate the said substantial question of law in view of the settled law, as per the provisions of the Order XLI Rule 17(1), CPC, which is followed by the decision of the Hon'ble Supreme Court in the case of Ghanshyam Dass Gupta versus Makhan Lal reported in (2012) 8 SCC 745

12. In the light of the above, the following substantial question of law is formulated :

Whether the Lower Appellate Court can decide an appeal on merits without hearing the appellant or her counsel as per the provisions of the order XLI Rule 17 (1) CPC

13. In view of the settled law that the Lower Appellate Court cannot decide an appeal on merits in the absence of the appellant, as per Order XLI Rule 17(1) CPC, the sole substantial question of law, formulated by this Court under Section 100(4) CPC is answered in favour of the appellant, without considering the merits of the dispute. It is made clear that this Court has not expressed any opinion on the merits of the matter.

14. In view of the non compliance of Order XLI Rule 17 (1) CPC by the lower Appellate Court, there is no necessity for this Court to consider whether the substantial question of law raised by the appellant extracted in para 7 stated supra, deserves any merit at all.

15. For the foregoing reasons, the Second Appeal stands allowed. No costs. Consequently, connected miscellaneous petition is closed. Accordingly, the matter is remanded back to the Lower Appellate Court viz., Fast Track Court-II, XVI Additional Judge, Chennai for fresh consideration of the first appeal, A.S.No.202 of 2005 filed by the appellant on merits, after hearing both the parties to the dispute. The First Appellate Court shall dispose of the appeal within a period of three months from the date of receipt of a copy of this order.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1) The XVI Additional Judge,
Fast Track Court II,
Chennai.

2) The XV Assistant Judge,
City Civil Court,
Chennai.

+1cc to Mr.B.R.Shankaralingam , Advocate SR.No. 82522

S.A. No.1479 of 2007

A.SK(28/09/2020)

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